Supreme Court, U.S.
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No. 90-1893

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MICHAEL HIRSH,
Petitioner,

v.

CITY OF ATLANTA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does an injunction that forbids the distribution of literature on public ways and sidewalks, absent the prior, express oral consent of each recipient, violate the right to free speech under the First and Fourteenth Amendments?

2. Does an injunction that forbids conversation with, or the display of a sign to, any other person, within five feet of that person, absent the prior, express oral consent of that other person, violate the right to free speech under the First and Fourteenth Amendments?

3. Does an injunction that compels objectionable speech by requiring a person affirmatively to "instruct" others "not to engage in or participate in any of the activities enjoined" violate the right to free speech under the First and Fourteenth Amendments?

4. Is an injunction that forbids otherwise lawful expressive activity in public places an unconstitutional prior restraint?

5. Does an injunction that forbids otherwise lawful expressive activity and applies only to opponents of abortion violate the rights to free speech and equal protection of the laws under the First and Fourteenth Amendments?

6. Are the terms of the challenged injunction unconstitutionally vague or overbroad?

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The decision below sustained an injunction that created new and substantial restrictions on free speech in public places. The respondent City of Atlanta has attempted to minimize the clear conflict among the state and federal courts regarding the constitutionality of such an injunction, and has attempted to explain away the serious incompatibility of this ruling with the precedents of this Court. The city fails, however, in this effort.

The gravity and obviousness of the threat to free speech which the injunction at issue poses prompted four members of this Court last year to vote to stay the injunction pending petitioner Hirsh's appeal to the Supreme Court of Georgia. *See Hirsh v. City of Atlanta*, 110 S. Ct. 2163 (1990) (App. 35a) (denying application for stay by 5-4 vote, over the dissent of Justices Kennedy, Brennan, Marshall, and Scalia). This Court should now grant plenary review to address on the merits the important constitutional questions presented.

ARGUMENT

The central question presented in this case is the constitutionality under the first amendment of an injunction that restrains otherwise lawful free speech. Petitioner Michael Hirsh is an active opponent of human abortion; within the boundaries of the respondent City of Atlanta are at least five abortion facilities. These facilities have been the focus of various anti-abortion activities—everything from peaceful picketing and literature distribution to physical blockades.

Under the first amendment, an injunctive remedy must distinguish between lawful free speech, on the one hand, and such generally unlawful activities as trespass or obstruction, on the other hand. To restrain the former in

response to the latter—as was done here—is an unconstitutional overreaction.[1]

I. THE INJUNCTION IMPOSES SUBSTANTIAL AND IMPERMISSIBLE RESTRICTIONS ON FREE SPEECH.

The City of Atlanta tries to minimize the seriousness of the restrictions on free speech in the case at bar. The challenged portions of the injunction, however, plainly have a substantial and detrimental impact on free expression.

Paragraph Five of the injunction creates a "speech-free bubble zone" around anyone who uses public ways or sidewalks within 50 feet of the property line of any abortion facility (or parking lot used by staff or patrons) in the City of Atlanta. Amended Order ¶ 5 (App. 30a-31a). No one may display a sign, offer a leaflet, or even speak to another person, with a five-foot imaginary "bubble" surrounding that person, without first obtaining the "express oral consent" of that person. This unprecedented prior "audience consent" requirement effectively bans the distribution of literature.

> As residents of metropolitan areas know from daily experience, confrontation by a person asking for [something] disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation.

United States v. Kokinda, 110 S. Ct. 3115, 3123 (1990) (plurality). Instead of allowing for a quiet "encounter with a person giving out information," *id.*, the "bubble

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[1] The city provides an extended discussion of anti-abortion blockades, *see* Brief in Opp. at 2-5; those portions of the injunction that prohibit trespass, obstruction, tortious harassment, and excessive noise, however, are not at issue in the present petition.

zone" provision forces opponents of abortion to *solicit* "express oral consent" to deliver their message—or else cease efforts to communicate.[2] For these same reasons, the "bubble zone" provision effectively bans even mere conversation within the "bubble of silence" surrounding passersby. Picketers, meanwhile, in order to comply with the "bubble zone," must conceal the messages on their placards whenever passing within five feet of another person.

Paragraphs Five and Seven of the injunction impose restrictions that apply only to anti-abortion speech. The city's claim that the injunction would apply to "picketing or demonstrating for reasons other than opposing abortion," Brief in Opp. at 18, flies in the face of reason and the text of the injunction itself. (The order applies by its terms only to "persons acting in concert or participation with" the anti-abortion defendants. App. 29a). It is simply unthinkable that the city would cite for contempt an opponent of apartheid who was silently leafletting within fifty feet of a parking lot used by abortion patrons. Yet a pro-lifer would face contempt charges for identical activity. If an animal rights marcher totes a sign reading, "Honk if you love baby seals," the injunction does not apply. But if an opponent of abortion standing at the same location displays the message, "Honk if you love babies," that is contempt of court. This is "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Carey v. Brown*, 447

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[2] Contrary to the claim of the city, the "bubble zone" provision is not a mere safeguard of personal space. The provision does not forbid approaching within five feet of another person *simpliciter*; instead, the ban only applies to someone seeking to communicate. The "bubble zone" provision allows an opponent of abortion the "alternative" of standing within five feet of any other person, even if the other person tells him to "get away," so long as the opponent of abortion agrees "to discontinue all efforts at passing [a] leaflet or handbill or displaying [a] sign or engaging in . . . protest, education or counseling." App. 31a. The "bubble zone" bans speech, not physical proximity.

U.S. 455, 463 n.7 (1980) (citations and quotation marks omitted).

Paragraph Ten of the injunction compels Hirsh to "instruct" others "not to engage in or participate in any of the activities enjoined in this order." Amended Order ¶ 10 (App. 32a). The injunction already forbids Hirsh to "solicit, induce or direct any other person to violate the provisions of this order." *Id.* ¶ 8 (App. 32a). Paragraph Ten goes much farther, not simply requiring Hirsh to refrain from inciting others to act, but affirmatively requiring him to "instruct" others *not* to act. This compulsory speech is deeply offensive to Hirsh, who believes that people have a moral obligation to oppose human abortion, especially by lawful means such as leafletting, Tr. 140. Conscripting Hirsh's tongue against his will is fundamentally inconsistent with free speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

The city's attempt to portray the injunction as creating no more than minor limitations on free speech, then, greatly misconceives the severity of this injunction.[3]

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS AND FEDERAL COURTS OF APPEALS.

In its brief, the city emphasizes the agreement among the state and federal courts that an injunction may issue to forbid trespass, obstruction of access, and similar anti-

[3] Hirsh and the city are in agreement that the Supreme Court of Georgia eliminated one additional restriction on speech—a fifty-foot ban on demonstrations, pickets, and protests—originally imposed by the trial court. Pet. at 7 n.4; Brief in Opp. at 5 n.3. But while the injunction as modified permits up to twenty opponents of abortion within fifty feet of each abortion facility, the "bubble zone" provision still effectively negates any opportunity to leaflet or engage in sidewalk counseling. The value of mere presence is largely defeated by the severe burden on speech imposed under the remaining portions of the injunction.

abortion "rescue" activities. But the propriety of injunctions against trespass is not the issue here. Petitioner Hirsh challenges only the restrictions the present injunction imposes on traditional free speech activities—picketing, leafletting, and pure verbal speech. On the specific question whether an injunction may restrain otherwise lawful free speech and assembly in public places, the state and federal courts are deeply divided. Pet. § I.

The Fifth Circuit, for example, in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), refused to approve an injunction banning anti-abortion activities within 500 feet of an abortion facility. The court held, not that the injunction was merely too broad, as the city suggests, Brief in Opp. at 13, but that the first amendment permitted the court no *authority*, in the absence of some state law regulating the activities in question, to "cut off the peaceful communication of information," 866 F.2d at 796 (lead opinion of Gee, J.). The "bubble zone" ban on leafletting at issue here, by contrast, directly cuts off peaceful communication.

The highest court of Massachusetts likewise declared peaceful speech on public sidewalks to be protected under the first amendment, *Planned Parenthood League of Massachusetts, Inc. v. Operation Rescue*, 406 Mass. 701, 713-15, 550 N.E.2d 1361, 1369-70 (1990), and held that an injunction "must differentiate between legal and illegal expressive activity," *id.* at 713, 550 N.E.2d at 1369. The court below, by contrast, sustained injunctive restrictions not only against trespass, but also against peaceful speech on public sidewalks.

The appellate courts of New York have twice eliminated portions of injunctions that restricted the free speech of abortion opponents in public places. *See O.B.G.Y.N. Ass'n v. Birthright of Brooklyn and Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (1978) (peaceful picketing, conversation, literature distribution, messages on placards); *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1982) (peaceful demonstrations,

handing out pamphlets, carrying placards, quiet verbal efforts to persuade). The court below, by contrast, sustained injunctive restrictions on peaceful picketing, literature distribution, and mere quiet conversation.

The Fourth Circuit went so far as to affirm the denial of an injunction against "activities that tend to 'intimidate, harass, or disturb patients or potential patients'" because of concern for the mere "risk" of deterring protected speech. *National Organization for Women v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (per curiam), *cert. granted on other grounds sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). The court below, by contrast, upheld far more substantial, direct restrictions on expressive activity in public places.

The city repeatedly misrepresents the relevant decision in the Second Circuit, *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), as upholding an injunction "almost identical" to the one at issue here. Brief in Opp. at 10, 11, 24. The truth is quite the contrary. The injunction in *New York State NOW* contained *no* "bubble zone," *no* limitation on the number of demonstrators on public ways outside abortion businesses, *no* ban on certain messages on signs, and *no* compulsory speech requirement. In short, the injunction the Second Circuit upheld contained *none* of the provisions at issue here. Indeed, it was precisely the *absence* of any restrictions on lawful speech in public places that the Second Circuit relied upon in sustaining the injunction. Pet. at 11.

The city correctly points out that the case of *White House Vigil v. Clark*, 746 F.2d 1518 (D.C. Cir. 1984), involved regulations, not an injunction. Brief in Opp. at 15. Petitioner Hirsh already noted this fact, Pet. at 11 n.7, and carefully pointed out that the *ratio decidendi* of *White House Vigil*—that courts have no authority to modify an existing regulatory scheme governing the time,

place, and manner of speech in public places—is completely incompatible with the decision below, which endorses "judicial rulemaking" by means of injunction. Pet. at 10-11.

The conflict among the state and federal courts, over the constitutionality of injunctions against otherwise lawful free speech, is plain. This Court should grant review to resolve that conflict.

III. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

The decision below, sustaining serious injunctive restrictions on otherwise lawful free speech, conflicts in numerous ways with the precedents of this Court. Pet. § II. This is not surprising: *no* decision of this Court has ever endorsed the use of a prior injunctive restraint against *lawful* free speech. Nor has the city succeeded in reconciling the decision below with the decisions of this Court.

A. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court held that judicial remedies *must* distinguish between unlawful activity and lawful free speech. The injunction at issue here violates the teaching of *Claiborne Hardware* because it disregards the protected status of peaceful speech in public places. Pet. § II(A).

Claiborne Hardware held that the assessment of damages for particular torts provides no basis for imposing damage liability for free speech activities; logically, then, the grant of a remedial injunction against particular torts likewise could not justify enjoining otherwise protected speech. *See* 458 U.S. at 924 n.67 ("*For the same reasons*," the permanent injunction "must be dissolved"; the injunction "must be modified to restrain *only unlawful conduct* and the persons responsible for *conduct of that character*") (emphases added). The city's attempt derisively to confine the rule of *Claiborne Hardware* to a single footnote in the Court's opinion, Brief in Opp. at

17, is seriously mistaken. That footnote simply applied the rule of decision to injunctions. The consignment of this matter to a footnote only highlights the uncontroversial nature of this logical corollary to the Court's holding.

B. The decision below also ignores the prior restraint doctrine, and instead reviews injunctive restrictions on speech under the deferential time, place, and manner analysis reserved for legislation. Pet. § II(B).

The city has discovered only one solitary decision—a federal appeals court ruling—applying time, place, and manner analysis to an injunction against free speech in public places. The Ninth Circuit, in rendering this unique opinion, cited no authority for treating an injunction like a statute or ordinance. *See Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988). The rule in this Court, contrary to the Ninth Circuit's isolated holding, is that injunctive restrictions on speech in public places are scrutinized under the demanding standard for prior restraints. *E.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (injunction against marches and rallies); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (injunction against distribution of literature); *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968) (court order restraining public rallies and meetings). The decision in *Portland Feminist* is merely a lonesome aberration.

The city cites another federal appellate decision, *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), as supposed authority for applying time, place, and manner analysis to injunctions against lawful speech in public places. But the injunction at issue in *New York State NOW* forbade only trespass and physical blockades, not classic, lawful free speech activities such as picketing and leafletting on public sidewalks. *See* 886 F.2d at 1354 n.1 (text of injunction). Indeed, the Second Circuit explicitly affirmed the

right of anti-abortion activists to "express their views . . . when standing on a public sidewalk," *id.* at 1363.[4]

C. The decision below also runs afoul of this Court's jurisprudence by sustaining restrictions on lawful speech in public places which apply only to anti-abortion speech. Pet. § II(C). The city has not attempted to justify such discrimination, but instead simply denies that the injunction applies only to pro-lifers. As discussed above, the city's interpretation of the injunction—as if it were an ordinance applicable to everyone—is nonsensical and itself unconstitutional. *See also* Pet. at 23 n.13.

D. The challenged terms of the injunction conflict, in any event, with the precedents of this Court upholding free speech rights in public fora. Pet. § II(D).

The city cites no case upholding a "prior consent" requirement for speech on public sidewalks. Indeed, the notion that one would first have to seek explicit verbal leave of a passerby, before offering a leaflet, is virtually unthinkable.

The city's solitary authority for its "bubble zone" is a law review note. Brief in Opp. at 21. But even this article supports Hirsh, not the city.[5] To impose a prior con-

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[4] The city claims that the injunction at issue in *New York NOW* restricted sidewalk counseling to not more than two people. Brief in Opp. at 11. This is inaccurate. The injunction contained a "safe harbor" *proviso* conferring an affirmative exemption—not a ceiling—for sidewalk counseling by "not more than two people *with each person they are seeking to counsel*," i.e., two counselors *per passerby*. *See* 886 F.2d at 1345 n.1 (emphasis added). To construe his "safe harbor" clause as a limit on free speech would be to turn this provision on its head. *See also id.* ("nothing in this order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights").

[5] The article "concedes that bubble zone protection burdens expressive activity that merits first amendment protection," Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 Harv. L. Rev. 1856, 1859 (1988), and specifically criticizes the implementation of bubble zones by means of injunction, observing that "these injunctions probably would constitute 'prior restraint,' " *id.* at 1873. Moreover, the Note concludes that even a bubble zone *ordinance*—

sent requirement "which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees [of free speech and freedom of the press]." *Schneider v. State*, 308 U.S. 147, 164 (1939).

E. The compulsory speech portion of the injunction (Paragraph Ten) forces petitioner Hirsh to violate his conscience by telling others to obey the injunction. The precedents of this Court clearly forbid such compulsory speech. Pet. § II(E). The city cites no authority to the contrary, but instead baldly denies the violation of conscience (as if the city were the judge of Hirsh's conscience). Brief in Opp. at 25. The city notes that Hirsh is free to *add* as much speech as he wants, as if this could "cure" the offensiveness of the compelled speech. *Id.* Needless to say, this reasoning would require the overruling of all prior decisions of this Court holding compulsory speech unconstitutional.

CONCLUSION

This Court should grant the petition for certiorari in the case at bar.

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as opposed to an injunction—could be constitutional only "if amended to provide bubble protection only when protection is affirmatively invoked," *id.* at 1875. The bubble zone provision in the present injunction, by contrast, applies presumptively, i.e., until the listener gives "express oral consent." *See* Amended Order ¶ 5 (App. 31a).